"interconnection agreement" incorporating final terms (both negotiated and adjudicated). Id. § 252(b), (c). Congress placed tight time deadlines on this process: States are required to finalize interconnection agreements within nine months of a new entrant's first request for negotiations. Id. § 252(b)(4)(C).

Although Congress assigned an adjudicatory role to state commissions like the DTE because of their familiarity with local conditions, it was quite explicit that substantive federal law would govern resolution of any disputed issues. Id. § 252(c)(1) (state commission shall "ensure that such resolution [of any open issues] . . . meet[s] the requirements of section 251 . . . including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251"). In order to guarantee the uniformity of these federal standards, Congress granted federal courts exclusive jurisdiction to review state commission actions to ensure compliance with the requirements of §§ 251 and 252. Id. § 252(e)(6); see also id. § 252(e)(4) (denying state courts jurisdiction to review interconnection agreements).

B. The FCC's Regulations

In an effort to ensure that uniform federal standards were in place before § 252's negotiation and arbitration process commenced in earnest, Congress also directed the FCC to "complete all actions necessary to establish regulations to implement the requirements of [§ 251]" within six months of passage of the 1996 Act. Id. § 251(d)(1). Accordingly, the FCC issued an order and regulations implementing the local competition provisions of the Act on August 8, 1996. See generally Local Competition Order. Two aspects of those regulations are at the heart of the issues presented in this case. First, the FCC mandated that a specific pricing methodology be used by state commissions in setting rates for unbundled network elements. See 47 C.F.R. §§ 51.503, 51.505. Second, the FCC interpreted the Act to require incumbent LECs to provide new entrants with unbundled network elements in combination, not merely individually, as those elements are combined in the incumbent LECs' networks. See id. § 51.315(b).

Immediately after the FCC's rules were published, they were challenged by BA-MA's corporate parent and others in the United States Court of Appeals for the Eighth Circuit. That court stayed and then invalidated the FCC's pricing rules on jurisdictional grounds. Iowa Utils. Bd., 120 F.3d at 800. The court held that Congress had not given the FCC the authority to decide what pricing methodologies to apply in setting rates for leasing of unbundled elements and wholesale purchase of services. That decision did not call the substance of the FCC's rules into question in any respect. Id. The Eighth Circuit also vacated the FCC's rules relating to combinations of network elements. Id. at 813. It held that the Act required new entrants, not incumbent LECs, to combine unbundled network elements, even when the elements were already combined in the incumbents' network. Id. Several parties appealed these portions of the Eighth Circuit's ruling, and the Supreme Court reversed on both issues in AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999). Because the Supreme Court's interpretation of the Act -- which is controlling in this case -- substantially clarified the law in the areas pertinent to MCI's complaint, a summary of the Court's relevant rulings is provided below.

1. The Supreme Court Held that the FCC Has Jurisdiction to Establish Uniform Pricing Rules.

The Court first held that the Eighth Circuit erred in concluding that the FCC lacked jurisdiction to establish pricing rules, including particular pricing methodologies, that state commissions must follow in setting rates for interconnection agreements. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. at 728-33. The Eighth Circuit had held that the FCC lacked authority to promulgate rules for intrastate rate-setting, an area it believed was left to the exclusive province of the state commissions. See Iowa Utils. Bd., 120 F.3d at 795-800. In reversing the Eighth Circuit, the Supreme Court held that § 201(b) of the Communication Act of 1934 grants the FCC the power to implement all provisions of the Act. See 47 U.S.C § 201(b). "[T]he grant in § 201(b) means what it says," the Court held:

"The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996." 119 S. Ct. at 730.

The Court also held that the 1996 Act gave the FCC "jurisdiction to design a pricing methodology" to be applied under the Act, and that the FCC's promulgation of regulations setting forth such a methodology did not improperly impinge on the ability of each state commission to "establish the rates" that would apply to interconnection agreements under § 252(c)(2) of the Act. 119 S. Ct. at 732. The Supreme Court thus upheld the FCC's pricing regulations codified in 47 C.F.R. §§ 51.501-51.515, 51.601-51.611, and 51.701-51.717. The regulations provide, among other things, that rates for unbundled network elements must be based on the forward-looking economic cost of providing the elements in question. A challenge to the merits of the FCC's pricing regulations is pending before the Eighth Circuit. At this time, however, the FCC's pricing regulations are in effect and binding on the parties and this Court.[5] See US West Communications, Inc. v. Thoms, No. 4-97-CV-70082, slip op. at 4-5 (S.D. Iowa Apr. 19, 1999) (applying FCC's reinstated pricing rules) (Tab B); US West Communications, Inc. v. Garvey, No. Civ. 97-913 ADM/AJB, slip op. at 19-20 (D. Minn. Mar. 31, 1999) (same) (Tab C).

2. The Supreme Court Restored the FCC's Regulations Regarding Combinations of Network Elements.

The Supreme Court also reversed the Eighth Circuit's decision vacating 47 C.F.R. § 51.315(b) ("Rule 315(b)"), which prohibits incumbent LECs from separating existing combinations of network elements before leasing them to a competitor. AT&T Corp. v.

5/ The FCC's Local Competition Order and its regulations, like any other properly promulgated federal administrative regulation, have the force and effect of federal law. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381-82 (1969); National Latino Media Coalition v. FCC, 816 F.2d 785, 788 (D.C. Cir. 1987); see also Chrysler Corp. v. Brown, 441 U.S. 281, 295-96 (1979); Batterton v. Francis, 432 U.S. 416, 425 & n.9 (1977). Under the Hobbs Act, any challenge to the FCC's order must be raised in a direct appeal, not by way of collateral attack through a § 252(e)(6) proceeding. See 47 U.S.C. § 402; 28 U.S.C. § 2342; FCC v. ITT World Communications, Inc., 466 U.S. 463, 468 (1984).

Iowa Utils. Bd., 119 S. Ct. at 737-38. Rule 315(b) provides that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." The Court rejected the argument made by BA-MA and other incumbent LECs that Rule 315(b) "eviscerates the distinction between resale and unbundled access" and "amounts to Government-sanctioned regulatory arbitrage." 119 S. Ct. at 737.

The Court held:

> the rule the [Federal Communications] Commission has prescribed is entirely rational, finding its basis in § 251(c)(3)'s nondiscrimination requirement. As the Commission explains, it is aimed at preventing incumbent LECs from "disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason but just to impose wasteful reconnection costs on new entrants.". . . It is true that Rule 315(b) could allow entrants access to an entire preassembled network. In the absence of Rule 315(b), however, incumbents could impose wasteful costs on even those carriers who requested less than the whole network. It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice.

Id. at 737-38 (citations omitted). Thus, Rule 315(b) is in effect and is binding in this proceeding. See US West v. Thoms, slip op. at 10 (Tab B); US West v. Garvey, slip op. at 19-20 (Tab C).

C. **The Proceedings Below**

After unsuccessful negotiations with BA-MA, MCI filed a petition for compulsory arbitration of unresolved issues with the DTE pursuant to § 252(b) of the Act on August 29, 1996. The DTE designated an arbitrator to resolve issues specific to MCI and BA-MA, and on December 26, 1996, the DTE approved the arbitrator's determinations. While the arbitration of issues specific to MCI and BA-MA was ongoing, the DTE consolidated many of the issues presented in MCI's petition with arbitration petitions filed by four other competitors seeking to provide local service in Massachusetts. The consolidated arbitration proceeding was divided into four phases, the fourth of which concerned prices for unbundled network elements. The DTE issued an order in Phase 4 on December 4,

1996. JA - 1 [6] (Consolidated Petitions of New England Telephone & Telegraph Co. d/b/a NYNEX, Teleport Communications Group, Inc., Brooks Fiber Communications, AT&T Communications of New England, Inc., MCI Communications Co., and Sprint Communications Co., L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between NYNEX and the aforementioned companies, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 -- Phase 4, Decision (Dec. 4, 1996) ("12/4/96 Phase 4 Decision")).[7] The parties, including BA- MA and MCI, requested reconsideration and clarification of several aspects of the DTE's decision in Phase 4 of the consolidated proceeding. On February 5, 1997, the DTE issued an order addressing those issues.

After a series of additional arbitration proceedings involving disagreements over contract language to implement the decisions in the MCI-specific and the consolidated proceedings,[8/] the parties identified three additional issues requiring resolution, including a dispute over BA-MA's obligation to provide combinations of unbundled network elements. On September 17, 1998, the DTE issued a decision resolving those issues and directing the parties to file an interconnection agreement for the DTE's approval. JA - 2 (Petitions of MCI Communications Co., pursuant to Section 252(b) of the Telecomm. Act of 1996, for arbitration of an interconnection agreement between MCI and New England

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6/ The parties have agreed to submit a joint appendix after briefing has concluded.

7/ The DTE issued an order in Phase 1, which concerned initial issues, on November 8, 1996; in Phase 2, which concerned the wholesale discount for resale of BA-MA's services, on December 3, 1996; and in Phase 3, which concerned non-cost issues, on December 4, 1996.

8/ The arbitrator issued decisions addressing certain issues on July 28, September 2, October 7, and December 25, 1997 and February 7, 1998. The parties filed certain exceptions to the arbitrator's decisions. On May 21, 1998, the DTE issued a decision addressing those exceptions and otherwise adopting the arbitrator's decisions. On June 16, 1998, the DTE issued a corrected version of its May 21 decision.

Telephone and Telegraph Co., d/b/a Bell Atlantic-Massachusetts, D.P.U./D.T.E. 96-83, Decision (Sept. 17, 1998) ("9/17/98 MCI-BA Decision")).

On October 2, 1998, MCI and BA-MA submitted an executed interconnection agreement, including both arbitrated and negotiated provisions, to the DTE for its approval. On October 30, 1998, the DTE, pursuant to § 252(e)(2)(B) of the Act, issued an order approving a final version of the Agreement. MCI's complaint in this Court followed.

ARGUMENT

I. THE COURT SHOULD REVIEW THE DTE'S CONCLUSIONS OF LAW DE NOVO AND ITS FACTUAL FINDINGS UNDER A STANDARD MODELED AFTER THE ADMINISTRATIVE PROCEDURE ACT'S ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW

The standard of review that this Court should apply to resolve the issues raised in MCI's complaint is straightforward. The Court should review de novo the DTE's resolution of legal issues -- i.e., its interpretations of the Act's substantive provisions and the FCC's binding regulations. The Court must interpret the Act's substantive requirements independently and owes to a state commission none of the deference afforded a federal agency's construction of a federal statute under Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Every court to have ruled on this issue has agreed, and has reviewed state commissions' interpretations of the 1996 Act de novo.[9/]

This Court should review the DTE's findings of fact under a standard modeled after the Administrative Procedure Act's familiar "arbitrary and capricious" standard.[10] The

9/ See, e.g., AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., 7 F. Supp. 2d 661, 668 (E.D.N.C. 1998); Morrison, 6 F. Supp. 2d at 524 ("While courts may grant a level of deference to a federal agency's interpretation of federal law, the same does not apply to state commissions."); AT&T Communications of Cal. Inc. v. Pacific Bell, No. C 97-0080 SI, 1998 WL 246652, at *3-*4 (N.D. Cal. May 11, 1998); U S WEST Communications, Inc. v. Hix, 986 F. Supp. 13, 17-18 (D. Colo. 1997) ("Chevron and its progeny are not controlling. Many of the reasons why deference is given to federal agencies in those cases do not apply here.").

10/ See, e.g., Morrison, 6 F. Supp. 2d at 523-24; AT&T v. Pacific Bell, 1998 WL 246652, at *4; U S West v. Hix, 986 F. Supp. at 18-19; Colorado Health Care Ass'n

Court should defer to the DTE's factual determinations only if they are adequately supported in the record, and are not otherwise arbitrary and capricious.

II. THE DTE FAILED TO PRICE UNBUNDLED LOCAL LOOPS ON THE BASIS OF EFFICIENT, FORWARD-LOOKING COSTS.

One of the important tasks undertaken by the DTE in the consolidated arbitration proceeding was the establishment of rates to be charged new entrants when they lease elements of BA-MA's network. The Act requires rates for unbundled network elements to be "based on the cost . . . of providing the . . . network element." 47 U.S.C. § 252(d)(1). This "cost" standard was interpreted by the FCC, in its binding regulations, as requiring rates to be set on the basis of a particular measure of cost called "total element long-run incremental cost," or "TELRIC." 47 C.F.R. §§ 51.503, 51.505. One of the key characteristics of a TELRIC methodology is that it measures cost "based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." 47 C.F.R. § 51.505(b)(1). Although the DTE generally applied a TELRIC methodology in setting rates for unbundled network elements, it departed from this critical aspect of TELRIC in one respect. The DTE erroneously adopted BA-MA's assumption that fiber-optic feeder cable, as opposed to copper feeder cable, is the least costly technology for use in <u>all</u> local loops (<u>i.e.</u>, the lines that connect individual homes and offices to BA-MA's switching facilities). <u>See</u> JA - 1 (12/4/96 Phase 4 Decision at 15-17). Because copper cable is more cost-efficient for loop lengths of less than 9,000 feet, and because TELRIC costs must reflect the most efficient available equipment, the DTE's assumption of fiber feeder cable in all loops is inconsistent with the Act and the FCC's regulations.

Measuring cost on the basis of "the most efficient telecommunications technology currently available," 47 C.F.R. § 51.505(b)(1), is essential in order to achieve the Act's

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<u>v. Colorado Dep't of Soc. Servs.</u>, 842 F.2d 1158, 1164 (10th Cir. 1988); <u>Guaranty Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.</u>, 794 F.2d 1339, 1342 (8th Cir. 1986).

goal of creating local competition as quickly as possible. In a competitive market, new entrants use the most efficient technologies available in order to price their services below those of the incumbent LECs. Incumbent LECs must then become more efficient, and are driven themselves to innovate, in order to meet the competitive challenge. These are exactly the benefits that Congress hoped to bring about by eliminating the incumbent LECs' monopolies. To create those benefits as rapidly as possible, the rates that new entrants are charged for unbundled network elements must replicate the rates that would prevail in a competitive environment, thereby permitting new entrants to charge competitive rates. Thus, in order both to comply with the FCC's regulations and to further the Act's purpose of jump-starting local competition, the DTE was required to set rates that are based on use of the most cost-efficient facilities and equipment available. BA-MA and the DTE have not disputed this requirement of forward-looking cost.

However, with respect to the feeder portion of unbundled local loops, the DTE departed from this "most efficient technology" requirement. Local loops, which connect individual homes and businesses to BA-MA's switches, are typically divided into "distribution" facilities and "feeder" facilities. Distribution facilities are the wires that connect directly to the customer's premises. Those wires terminate at a device called a "feeder-distribution interface" (often housed in a green metal box by the side of a road), where multiple distribution facilities are connected to a single feeder cable that runs back to BA-MA's switch. A diagram of these arrangements is attached at Tab D.

The DTE calculated TELRIC costs using BA-MA's assumption that feeder facilities constructed of fiber-optic cable, rather than copper cable, are more cost-efficient for <u>all</u> local loops, regardless of length. <u>See</u> JA - 1 (12/4/96 Phase 4 Decision at 15-17). In adopting that assumption, the DTE disregarded unrebutted record evidence that for voice-grade loops of less than 9,000 feet, copper cable is the more cost efficient technology. <u>See, e.g.</u>, JA - 3 (Globerson Rebuttal at 10); JA - 4 (11/6/96 Tr. at 209 (Globerson)). Copper is cheaper than fiber for shorter loops because, although fiber cable costs less on a per foot basis than copper cable, fiber-based feeder requires expensive electronic systems to "light" the fiber. These expensive electronics can only be justified for feeder systems that are used over long distances. Only if the feeder extends over greater distances will the lower costs of fiber (relative to copper cable) offset the higher costs of the electronics used to light the fiber. See JA - 6 (11/8/96 Tr. at 44-45 (Mercer)).

The evidence that copper feeder is more cost-efficient than fiber for shorter loops was buttressed by testimony that no other incumbent LEC, including the company that is now BA-MA's parent, had attempted to cost-justify the use of fiber-optic cable in loops of less than 9,000 feet. See JA - 4 (11/6/96 Tr. at 207-08 (Globerson) (stating that Southwestern Bell uses copper feeder for lengths under 12,000 feet and that BellSouth and Bell Atlantic use copper feeder for lengths under 9,000 feet)); JA - 5 (11/7/96 Tr. at 76-77 (Ankum) (stating that Ameritech uses copper feeder for lengths under 9,000 feet)).[11/] All of the evidence before the DTE pointed to the conclusion that copper cable is accepted throughout the telecommunications industry as the least-cost, most efficient technology for feeder lengths of less than 9,000 feet.

In support of the contrary conclusion -- that fiber-optic cable is more cost-efficient for loops of all lengths -- BA-MA offered, and the DTE relied on, a BA-MA study that compared a copper feeder architecture to a fiber-optic feeder architecture and concluded that the fiber architecture was preferable. See JA - 7 (Proprietary Ex. 1 ("The Network of Tomorrow")). As BA-MA's witness acknowledged, that study did not compare the cost-efficiency of copper and fiber for different loop lengths, but simply determined that a

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11/ See also Petition of AT&T Communications of the Southwest, Inc. for Compulsory Arbitration with GTE Southwest, Inc. and Contel of Texas, Inc., Docket Nos. 1630, 1635, Order at 128-29 (Tex. PUC Dec. 12, 1996) (noting that GTE advocates use of copper for lengths under 12,000 feet); Rulemaking on the Commission's Own Motion into Universal Service, R.95-01- 020, Order at 135 (Cal. PUC Oct. 25, 1996) (noting that Pacific Bell advocates use of copper for lengths under 12,000); In re Federal-State Joint Board on Universal Service, Fifth Report and Order, 14 Communications Reg. (P&F) 85, ¶ 22 (rel. Oct. 28, 1998) (noting that US West and Sprint advocate use of copper for lengths under 12,000).

network that used fiber feeder in all loops would offer advantages over a network that used copper feeder in all loops. See JA - 4 (11/6/96 Tr. at 337-38 (Gansert)). Thus, BA-MA's evidence failed even to address the question of whether copper is the least-cost technology for some loops, particularly loops of less than 9,000 feet. Indeed, BA-MA made no attempt on the record to rebut MCI's testimony on that question. The DTE therefore acted against the clear weight of the evidence when it concluded that BA-MA's assumption of fiber-optic feeder in every local loop was consistent with TELRIC methodology.[12]

Moreover, the DTE erred as a matter of law by failing to apply TELRIC's "most efficient technology" requirement to the measurement of the cost of shorter local loops. The DTE also erred as a matter of law by failing to comply with the FCC's rule prohibiting state commissions from including "[r]evenues to subsidize other services" in any calculation of TELRIC costs. See 47 C.F.R. § 51.505(d)(4). In violation of that rule, the DTE's assumption of all-fiber feeder forces CLECs to subsidize BA-MA's construction of a "broadband" network. A broadband network is a network with sufficient capacity to provide advanced services, such as video and high-speed data, in addition to "narrowband," voice-only services. Only fiber-optic cable offers the necessary capacity. Thus, one reason that fiber-optic cable has begun to be deployed in the feeder portion of local loops -- and that BA-MA determined that an all-fiber feeder architecture is appropriate for "the network of tomorrow" -- is to allow the provision of advanced services that require broadband capacity. However, provision of ordinary voice telephone service does not

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12/ One reason the DTE gave for adopting BA-MA's all-fiber assumption was that "use of fiber in the feeder system is an established industry practice." JA -1 (12/4/96 Phase 4 Decision at 16). This rationale replicates BA-MA's error of ignoring the variations in cost-efficiency of fiber and copper dependent on the length of the loop. Certainly, it is an established practice in the industry to use fiber-optic feeder, when the loop is sufficiently long for fiber to be cost justified. However, as is clear from the testimony concerning other incumbent LECs' use of copper feeder in shorter loops, it is not standard industry practice to use fiber feeder in every local loop. BA-MA and the DTE both treated the fiber/copper choice as an all-or-nothing proposition, when the evidence clearly showed that the most cost-efficient choice was to use fiber sometimes and copper sometimes.

require broadband capacity. Therefore, when MCI leases BA-MA's local loops in order to provide voice telephone service, it is being required to finance additional capabilities that are unnecessary to that service. This flatly violates the FCC's regulations. See id.

As discussed above, the most efficient means of providing short-length voice-grade loops is indisputably copper cable. Although BA-MA is certainly entitled to construct a broadband network that will allow it to provide video and other advanced services in the future, the costs of that network must not be imposed on competitors that lease unbundled loops for provision of voice telephone service only. Yet the DTE's adoption of BA-MA's all-fiber assumption has precisely that effect. The DTE attempted to justify that assumption by stating that BA-MA had been installing fiber feeder for five years, see JA - 1 (12/4/96 Phase 4 Decision at 16), but that fact -- which was undoubtedly motivated by BA-MA's plans to provide advanced services -- cannot justify a requirement that CLECs subsidize equipment and investments that are unrelated to TELRIC cost or the CLECs' service needs. By overlooking or ignoring the FCC's express prohibition of such subsidization, the DTE erred as a matter of law.

In sum, the DTE ignored the evidence and adopted BA-MA's unsupported assumption that fiber is the most appropriate technology for all loop lengths. In so doing, the DTE violated the Act and the FCC's regulations by setting rates that do not reflect the most cost-efficient technology, but rather force MCI to subsidize BA-MA's investment in broadband facilities that are not necessary to the provision of ordinary telephone service. This Court should vacate the DTE's order and remand the matter with instructions to set unbundled loop rates consistent with the Act and the FCC's regulations.

III. THE DTE FAILED TO REQUIRE BA-MA TO PROVIDE UNBUNDLED NETWORK ELEMENTS IN COMBINATION.

The DTE also erred by failing to require BA-MA to provide MCI with combinations of unbundled network elements. Section 251(c)(3) of the Act imposes on incumbent LECs the obligation to provide nondiscriminatory access to unbundled network elements "in a manner that allows requesting carriers to combine such elements" in order to offer telecommunications services. 47 U.S.C. § 251(c)(3). In binding regulations, the FCC interpreted this provision as requiring incumbents to provide unbundled network elements in combination where such elements already exist in the network in combined form. 47 C.F.R. § 51.315(b). The FCC's Rule 315(b) has been expressly upheld by the Supreme Court, which reversed the Eighth Circuit's decision vacating the rule. See AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. at 737-38. Thus, BA-MA is required by the Act and by the FCC's binding regulations to provide MCI with network elements in their combined form. See, e.g., US West v. Thoms, slip op. at 10 (Tab B).

The interconnection agreement that was approved by the DTE, however, does not comply with this legal requirement. Relying solely on the now-reversed decision of the Eighth Circuit, the DTE approved contract language stating that BA-MA "has no obligation to combine unbundled Network Elements." JA - 8 (BA/MCI Interconnection Agreement, Part A at A-1); see JA - 2 (9/17/98 MCI-BA Decision at 4 (approving BA-MA's proposed language)). However, the DTE recognized that the Eighth Circuit's ruling was under review by the Supreme Court, and that the DTE itself had an ongoing proceeding concerning combinations of network elements. The DTE therefore qualified that contract language with the phrase "pending a decision of either the [DTE] or the U.S. Supreme Court requiring [BA-MA] to provide combinations of unbundled Network Elements." JA - 8 (BA/MCI Interconnection Agreement, Part A at A-1); see JA - 2 (9/17/98 MCI-BA Decision at 2-4).

The Supreme Court has spoken, ruling definitively that incumbent LECs must provide combinations of network elements pursuant to the FCC's Rule 315(b). Moreover, the DTE has issued an order that relies on the Supreme Court's decision (and on BA-MA's own voluntary commitments) in requiring BA-MA to provide existing combinations of network elements, in their combined form, available to all CLECs. See Consolidated Petitions of New England Telephone & Telegraph Co. d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Co., and Sprint Communications Co., L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 -- Phase 4-J, Decision (Mar. 19, 1999) ("3/19/99 Decision") (Tab E). Thus, as a matter of law and by the interconnection agreement's own terms -- terms that were proposed by BA-MA and approved by the DTE -- BA-MA may no longer refuse to provide combinations of network elements that exist in its network in combined form.[13]

Before the DTE's March 19 decision, BA-MA argued that it could not be required to provide combinations of network elements, notwithstanding the Supreme Court's reinstatement of Rule 315(b), because the Supreme Court had vacated 47 C.F.R. § 51.319 ("Rule 319"), the rule that identified the network elements that incumbent LECs must make available to CLECs. See 3/19/99 Decision at 5-6. Because no effective rule required it to provide any network elements individually, BA-MA argued, it could not be required to provide any network elements in combination. See id. The DTE properly rejected this argument because BA-MA had agreed voluntarily in its interconnection agreements to provide the network elements identified in Rule 319, and because BA-MA had entered a commitment with the FCC to continue providing each of those elements pending the FCC's rulemaking to replace Rule 319. See id. at 8-9. Indeed, BA-MA never disputed that it is obligated to provide network elements individually.[14/] That obligation, in

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13/ Although the DTE now agrees with MCI that BA-MA must provide unbundled network elements in combined form, MCI continues to press this claim before the Court for two reasons. First, the interconnection agreement between MCI and BA-MA has not been modified to reflect the recent Supreme Court and DTE decisions. Second, BA-MA continues to contest its obligation to provide combinations of unbundled network elements by moving for reconsideration of the DTE's order imposing that obligation.

14/ In similar circumstances, the district court in US West v. Thoms rejected US West's argument that the Supreme Court's decision to vacate Rule 319 "somehow conjunction with the Supreme Court's ruling that network elements must be provided in combination, forecloses BA-MA's argument. As long as BA-MA is obligated to provide unbundled network elements to MCI, it must abide by the Supreme Court's ruling that it may not separate existing combinations of elements.

Therefore, the Court should reform the interconnection agreement, or direct the DTE to reform that agreement, so that it requires BA-MA to provide combinations of network elements in accordance with the Act and the FCC's regulations.

CONCLUSION

For the reasons stated above, this Court should grant summary judgment in favor of MCI and reform the interconnection agreement between MCI and BA-MA to comply

changes the number or nature of network elements US West is obligated to provide . . . under the interconnection agreement." US West v. Thoms, slip op. at 12 n.8 (Tab B). The court held that because US West had not disputed its obligation to provide those network elements before the state commission, it could not do so before the court, and it remained obligated to provide all the unchallenged network elements contained in the interconnection agreement. See id.

with the requirements of federal law, or remand to the DTE with directions to so reform the agreement.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION AND MCIMETRO ACCESS TRANSMISSION SERVICES, INC.

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DATED: April 30, 1999

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney(s) of record for each other party by ~~mail~~/hand on 4/30/99.

MAB

MARK A. BERTHIAUME

EXHIBIT 3

MCI Communications
Corporation

MCI

1801 Pennsylvania Avenue, NW
Washington, DC 20006

April 9, 1999

Ms. Dorothy Attwood
Chief, Enforcement Division
Common Carrier Bureau
Federal Communications Commission
The Portals
455 12th Street, S.W.
Washington, D.C. 20554

Dear Ms. Attwood:

As you know, some customers using MCI WorldCom subsidiary Telecom*USA's (T*USA) 10-10-321 service were incorrectly billed due to errors in LECs' switch routing processes. MCI WorldCom has been attempting for some time to take the steps necessary to provide refunds to these customers. Unfortunately, certain LECs have thwarted MCI WorldCom's efforts to provide refunds. These LECs have (1) refused to provide MCI WorldCom with the call summary records required to identify the customers who are due refunds and the amount of any such refunds; and/or (2) demanded extraordinarily large payments in return for the necessary call summary records. We outline below the status of MCI WorldCom's attempts to obtain the information necessary to provide refunds, where necessary, to T*USA's 10-10-321 customers. We also ask the FCC to compel certain LECs, as specified, to provide MCI WorldCom under reasonable terms and conditions the information required to issue these refunds.

Status of Credits for Customers of Affected LECs

<u>Sprint</u>: T*USA has received all necessary information and the credits have been approved. Consumers will begin receiving credits shortly.
<u>Bell Atlantic</u>: These credits, which represent the bulk of the consumer refunds, are being handled in two phases. The information has been received from Bell Atlantic and credits have been approved for phase I. These credits will soon appear on consumer's bills. Phase II credits will likely be sent to Bell Atlantic in May,1999.
<u>PacBell/SBC</u>: T*USA has received information from the LECs and we expect to send credits to PacBell/SBC in April, 1999.
<u>US West</u>: LEC call summary information is being processed by T*USA and we expect to send credits to US West in June 1999.
<u>GTE</u>: LEC call summary information is being processed by T*USA and we expect to

send credits to GTE in June 1999.
Ameritech: Claims no information available.
SNET: Claims no information available.
BellSouth: Will only provide data to T*USA at a charge of $164,545.00

MCI WorldCom has made repeated attempts to obtain from Ameritech, SNET, and BellSouth the call summary records needed to identify the customers who were mis-billed and the amount by which they were incorrectly billed.[1] Ameritech and SNET claim that they have not retained these records. MCI WorldCom is highly suspect of this contention, however, as it is our understanding that such telecommunications companies are required for legal reasons to retain call records for several years. Without this information, T*USA is unable to identify customers that were mis-billed or even how many customers are affected. We therefore ask the appropriate authorities at the FCC to compel Ameritech and SNET to provide MCI WorldCom by May 15, 1999 with the call summary records necessary to provide refunds to T*USA's 10-10-321 customers who were incorrectly billed.[2]

BellSouth, rather than outright refusing to provide MCI WorldCom with the necessary call summary records, is attempting to charge MCI WorldCom $164,545.00 for the subject call summary records. MCI WorldCom believes that it is entirely unreasonable for BellSouth to charge MCI WorldCom for the production of these call summary records which are necessary to make the affected customers whole. Indeed, MCI WorldCom's T*USA would not need these records but for errors in BellSouth's systems and BellSouth should not be permitted to hold T*USA's customers -- who are also their local customers -- hostage to its greed. MCI WorldCom therefore asks the FCC to compel BellSouth to provide by May 15, 1999, without charge, the call summary records necessary to refund the T*USA 10-10-321 customers who were incorrectly billed.[3]

[1] For example, in October 1998, MCI WorldCom began sending memos to Ameritech describing the data required to refund the affected 10-10-321 customers; on December 4, 1998, MCI WorldCom provided Ameritech with a list of switches and end offices involved in the billing errors; on February 9, 1999, Ameritech informed MCI WorldCom that Ameritech could not provide the information requested; on March 16, 1999, MCI WorldCom again requested that Ameritech make available the necessary information, to no avail. MCI WorldCom has made similar attempts to obtain the necessary call summary records from BellSouth and SNET.

[2] Specifically, we ask the FCC to compel Ameritech and SNET to provide MCI WorldCom with the 10-10-321 call records dated from May 1, 1997 through July 31, 1998 for the various switch/trunk and end offices possibly involved in the billing errors.

[3] In particular, we ask the FCC to compel BellSouth to provide MCI WorldCom with the 10-10-321 call summary records dated from May 1, 1997 through July 31, 1998 for the various switch/trunk and end offices possibly involved in the billing errors.

Please feel free to contact me should you need additional information. We appreciate your attention to this matter.

Sincerely,

Bradley Stillman
Senior Policy Counsel
Strategic Advocacy

cc Glenn Reynolds

EXHIBIT 4

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Vice President, General Counsel & Secretary

RECEIVED
NOV 1 3 1997

November 12, 1997

VIA HAND DELIVERY

James A. Nappi, Secretary
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Re: **I/M/O Petition of Bell Atlantic - New Jersey, Inc. for Approval of Its Statement of Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996 Docket No. TO97020075**

Dear Mr. Nappi:

Pursuant to commitments made to the Federal Communications Commission ("FCC") in connection with the merger of Bell Atlantic Corporation and NYNEX Corporation, Bell Atlantic - New Jersey, Inc. ("BA-NJ" or "Company") encloses for filing an original and ten (10) copies of a supplement to the Company's Statement of Generally Available Terms and Conditions ("SGAT"). This supplement, consisting of Appendix 1 and Appendix 2 to Exhibit A ("Detailed Schedule of Itemized Charges"), describes new payment options for competitive local exchange carriers ("CLECs") that otherwise would incur certain one-time, non-recurring charges established in the Interconnection Phase of the Generic Proceeding, Docket No. 95120631, or in their present interconnection agreements with BA-NJ.

In their merger commitments, Bell Atlantic and NYNEX promised to propose in interconnection negotiations and arbitrations, and to propose to state regulatory commissions within 90 days following FCC approval of the merger, options that would allow carriers purchasing interconnection to avoid paying certain one-time, non-recurring charges that would otherwise apply, and instead to pay such charges over time. The affected non-recurring charges are those for collocation, the establishment of office dialing plans, resold services, and unbundled network elements.

In accordance with the merger commitments, BA-NJ also is proposing these payment options in ongoing interconnection negotiations and arbitrations. The enclosed provisions will be included in interconnection agreements between BA-NJ and any CLEC wishing to avail itself of these new options.

The payment installment options outlined in the filing reflects the cost of money, anticipated bad debts and costs of administering the option. BA-NJ has used a 10.46% cost of money in accordance with the Board's decision in the Interconnection Phase of the Generic

Proceeding; although for the reasons set forth during the Interconnection Phase of the Generic Proceeding, this figure understates BA-NJ's the cost of money. In addition to the 10.46%, the cost of money, 2% has been included for anticipated bad debt. Adding these figures together, BA-NJ has derived a 12.46% annual factor to be applied in connection with the payment plans. Moreover, the payment installment options are designed to be revenue-neutral to BA-NJ compared to the payment of a one-time non-recurring charge.

Consistent with 47 U.S.C. § 252(f)(3), BA-NJ requests that, within 60 days, the Board complete its review of this supplement.

Thank you for your assistance in this matter.

Respectfully submitted,

Anne Babineau

ANNE S. BABINEAU

cc: Service List

I/M/O PETITION OF BELL ATLANTIC-NEW JERSEY, INC.
FOR APPROVAL OF ITS STATEMENT OF TERMS AND CONDITIONS
UNDER SECTION 252(F) OF THE TELECOMMUNICATIONS ACT OF 1996
BPU Docket No. TO97020075

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EXHIBIT A, APPENDIX 1

NON-RECURRING CHARGE INSTALLMENT PAYMENT OPTION FOR COLLOCATION AND CENTRAL OFFICE SWITCH DIALING PLANS

1. Subject to the terms and conditions specified below, [CLEC] may, at its option, elect to pay non-recurring charges for collocation and central office switch dialing plans (if applicable) on an installment basis over an 18-month period.

2. [CLEC] will be eligible for this payment option only if [CLEC] and its affiliates (as affiliates are defined in the Act), if any, have gross revenue of less than $2 billion per year arising from the provision of telecommunications services or facilities at the time the order is placed. BA may require [CLEC] to establish its eligibility under this section to BA's reasonable satisfaction.

3. The following non-recurring charges are subject to this installment payment option:

(a) For physical collocation: all elements associated with conditioning the space for collocation room construction (including but not limited to power plant upgrades, HVAC and asbestos removal), cage construction, overhead lighting and AC outlet, as well as cable installation.

(b) For virtual collocation: all elements associated with equipment installation and cable installation.

(c) All non-recurring charges associated with office dialing plans.

4. For physical collocation, the first payment will reflect 20% of the estimate rendered for construction of the room (common area), or pro rata amount if the room has already been built. Eighteen subsequent monthly payments will commence once the collocation site is complete (subject to tariffed interval) and will be based on the balance of room construction plus cage construction, overhead lighting, AC outlet and cable installation charges.

5. For virtual collocation, the first payment will reflect 20% of the total estimated cost for the entire virtual collocation arrangement. Eighteen subsequent monthly payments will commence once the collocation site is complete and service is rendered (subject to tariffed interval) and will be based on the balance of charges due.

6. For office dialing plans, the first payment will reflect 20% of the estimate to develop and implement the plan. Eighteen subsequent monthly payments will commence once the plan is in place (usually between 60 and 120 days).

7. The amount of each subsequent monthly installment payment shall equal the total remaining non-recurring charge that would otherwise apply, divided by 18 payments, and increased by an annual factor of 12.46%. This factor is intended to reflect the 10 46% cost of money used by the Board in the Interconnection Phase of the Generic Proceeding, Docket No. 95120631, plus 2% for anticipated bad debt. The result is that each of the 18 payments shall consist of 6.06% of the original total amount of non-recurring charge before deduction of the initial 20% payment. An additional payment of $197.19 per month will apply for the duration of the installment period, based on the costs to BA of administering the installment option.

8. The charges under this installment option are designed to be revenue neutral to BA compared to the payment of a one-time charge, and are subject to periodic prospective adjustments as often as quarterly to reflect actual bad debt experience, churn rates, administrative costs, or changes in the cost of money.

9. If the service is removed before all installment payments have been made, the remaining unpaid amount of the non-recurring charge shall be due and payable.

10. This installment payment option is offered by BA in fulfillment of a condition imposed by the FCC in approving the merger of Bell Atlantic Corporation and NYNEX Corporation. The availability, terms and conditions of this payment option are subject to change based on any change in, or definitive reinterpretation of, the underlying merger condition.

11. Unless expressly renewed by BA, this installment payment option will not be available for orders with due dates after August 14, 2001, according to standard intervals.

12. Service provided under this installment payment option is subject to all other terms and conditions of this Agreement or applicable tariffs, including those relating to deposits, billing, form of payment, late payment charges, and dispute resolution, if any. [CLEC] hereby grants to BA a continuing security interest in and to all of [CLEC]'s personal property including [CLEC]'s now-owned and hereafter acquired accounts, goods, general intangibles, equipment, inventory, and contract rights and in the proceeds and products thereof. The security interest granted hereby is to secure payment and performance of the obligations of [CLEC] hereunder. [CLEC] hereby agrees to execute all documents, including financing statements, required by BA to evidence, perfect and enforce the security interest granted hereunder. In the event of a default, BA shall have all rights and remedies available to it under the Uniform Commercial Code in addition to any rights and remedies available under law or equity.

EXHIBIT A, APPENDIX 2

OPTIONAL RECURRING PAYMENT PLAN FOR RESOLD SERVICES AND UNBUNDLED NETWORK ELEMENTS

1. Subject to the following terms and conditions, [CLEC] may, at its option, elect to pay non-recurring charges ("NRCs") for resold services and unbundled network elements over 18 months under an Optional Recurring Payment Plan ("Plan"), as described below.

2. The Plan shall apply to non-recurring charges incurred for resold services and for unbundled network elements purchased by [CLEC] **for the provision of basic residence and business dial tone line exchange or exchange access services (including vertical features) to retail customers.**

3. Once [CLEC] elects the Plan, [CLEC] is responsible for invoking the recurring payment option on each Local Service Request (LSR) or Access Service Request (ASR) submitted. All applicable NRCs on the same LSR/ASR will be billed on a recurring basis in accordance with the Plan.

4. The amount of each monthly payment shall equal the total remaining non-recurring charge that would otherwise apply, divided by 18 payments, and increased by a factor of 12.46%. This factor is intended to reflect the cost of money used by the Board in the Interconnection Phase of the Generic Proceeding, Docket No. 95120631, plus 2% for anticipated bad debt. The result is that each of the 18 payments shall consist of 6.06% of the original total amount of non-recurring charge. An additional payment of $197.19 per month will apply for the duration of the 18-month period, based on the costs to BA of administering the Plan.

5. The charges under this payment option are designed to be revenue neutral to BA compared to the payment of NRCs on a one-time basis, and are subject to periodic prospective adjustments as often as quarterly to reflect actual bad debt experience, churn rates, administrative costs, or changes in the cost of money.

6. This payment option is offered by BA in fulfillment of a condition imposed by the FCC in approving the merger of Bell Atlantic Corporation and NYNEX Corporation. The availability, terms and conditions of this payment option are subject to change based on any change in, or definitive reinterpretation of, the underlying merger condition.

7. Unless expressly renewed by BA, this payment option will not be available for orders with due dates after August 14, 2001, according to standard intervals.

8. Service provided and payments made under the Plan are subject to all other terms and conditions of this Agreement or applicable tariffs, including those relating to deposits, billing, form of payment, late payment charges, and dispute resolution, if any. [CLEC] hereby grants to BA a continuing security interest in and to all of [CLEC]'s per-

sonal property including [CLEC]'s now-owned and hereafter acquired accounts, goods, general intangibles, equipment, inventory, and contract rights and in the proceeds and products thereof. The security interest granted hereby is to secure payment and performance of the obligations of [CLEC] hereunder. [CLEC] hereby agrees to execute all documents, including financing statements, required by BA to evidence, perfect and enforce the security interest granted hereunder. In the event of a default, BA shall have all rights and remedies available to it under the Uniform Commercial Code in addition to any rights and remedies available under law or equity.

15116-1

EXHIBIT 5